Nos. 778, 779, 830, 831, 832, 833, 834, 835 and 836

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

OSCAR GRUSS & SON, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

ERIE-LACKAWANNA RAILROAD COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

BOSTON AND MAINE CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

READING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

CITY OF SCRANTON, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Statement

These consolidated appeals attack the judgment entered by the three-judge district court for the Southern District of New York on October 19, 1967, dismissing complaints

and intervening complaints against the orders of the Inter state Commerce Commission ("Commission") in Finance Docket No. 21989, *et al., Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 328 I.C.C. 304 and 330 I.C.C. 328 (the *Merger* case), authorizing the merger of Pennsylvania Railroad Company ("Penn") and New York Central Railroad Company ("Central"), and in Finance Docket No. 21510, *et al., Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. 780 and 331 I.C.C. 22 (the *Inclusion* case), authorizing and directing the Norfolk & Western Railway Company ("N&W") to include in its system Erie-Lackawanna Railroad Company ("E-L"), The Delaware and Hudson Railroad Corporation ("D&H") and Boston and Maine Corporation ("B&M") on terms specified therein.

In the original report in Finance Docket No. 21510, 324 I.C.C. 1, the Commission in 1964 approved the merger of the New York, Chicago & St. Louis Railroad Company ("Nickel Plate") into the N&W and the acquisition by N&W through lease or stock control of certain other carriers. As one of the conditions to its approval of the N&W's proposals, the Commission retained jurisdiction for five years to permit E-L, D&H and B&M to file petitions for inclusion and to direct affiliation of the three roads with N&W upon equitable terms, if found consistent with the public interest. In September of 1965, E-L, D&H and B&M filed their petitions for inclusion.

In the original report approving the Penn-Central merger, 327 I.C.C. 475, the Commission imposed traffic and indemnity conditions—the so-called Appendix G conditions—for the protection of E-L, D&H and B&M until those three roads could be included in the N&W system or, possibly, the Penn-Central system. However, in its report on reconsideration, 328 I.C.C. 304, the Commission rescinded the indemnity provisions and assigned the indemnity and traffic conditions for further hearing, along with the ques

tion of a possible capital loss indemnification provision, but decided that consummation of the Penn-Central merger should not be held up pending final decision on the protective conditions.

Upon appeals by various parties attacking the *Merger* order, the three-judge court for the Southern District of New York, with Judge Weinfeld dissenting, denied a temporary injunction in *Erie-Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964, but was subsequently reversed by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372. The Court stated (at p. 378):

> "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger."

After remand, the Commission issued supplemental reports and orders in the *Merger* and *Inclusion* cases, both decided June 9 and served June 12, 1967. In the *Merger* case, the Commission modified and reinstituted Appendix G protective conditions which are very favorable to E-L, D&H and B&M, found that no need was shown for any capital loss indemnification condition, and authorized prompt consummation of the Penn-Central merger. In the *Inclusion* proceedings, the Commission authorized and directed N&W to acquire stock control of E-L, D&H and B&M on specified terms, giving N&W an option to acquire D&H's assets for cash instead of through an exchange of stock.

On appeals by various parties attacking the Commission's order in the *Merger* case, the district court by order entered July 3, 1967, enjoined consummation of the merger "pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct."

D&H[1] brought an action to review the Commission's order in the *Inclusion* case; B&M and four insurance companies[2] holding large amounts of E-L's bonds ("E-L Bondholders") intervened as plaintiffs and, on motion of the United States and the Commission, the court directed that N&W be joined as an involuntary plaintiff.[3]

After the filing of briefs and other pleadings and hearing, the district court on October 19, 1967, disposed of all the actions in a single opinion, dismissing all of the complaints and intervening complaints, except that of The Central Railroad Company of New Jersey ("CNJ") whose Trustees, while reserving the right to assert that the order of the Commission should contain protective conditions for the benefit of CNJ, stipulated that they will not assert in any court any claim that the Penn-Central merger should be delayed for any reason or that the Appendix G conditions in favor of other carriers should be set aside. The complaint of the City of Scranton ("Scranton") and Milton J. Shapp ("Shapp") was dismissed with prejudice for want of prosecution. The complaints of Oscar Gruss & Son[4] ("Gruss") and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee ("NH Bondholders") were "dismissed without prejudice to any action plaintiffs may be advised to take

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[1] D&H's objections to the Commission's *Inclusion* order were satisfied in the subsequent report on reconsideration, decided August 10 and modified on September 1, 1967 (331 I.C.C. 22).

[2] John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society.

[3] N&W "does not raise before this Court the questions arising from the district court's . . . holdings on its joinder as an involuntary plaintiff and venue." (J. S. 779, p. 9.)

[4] Gruss' earlier complaint against the Commission's order in the *Merger* case was dismissed by the district court on the ground that Gruss had no standing to maintain it, *Oscar Gruss & Son* v. *United States*, 261 F. Supp. 386, but that order was vacated by this Court and the case remanded for further proceedings, 386 U. S. 776 (May 9, 1967).

with respect to any further order in F.D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Penn-Central."

The district court stayed enforcement of that portion of the Commission's order in the *Merger* case authorizing immediate consummation of the Penn-Central merger until 15 days after the date of its order, "and if within that period a notice of appeal to the Supreme Court is filed and an application for a further stay is made to that Court, until the determination of such application or other order of the Court or the Circuit Justice." The district court also stayed enforcement of the Commission's order in the *Inclusion* case with respect to N&W until 15 days from the date of its order, "and if within that period N&W files a notice of appeal to the Supreme Court of the United States and prosecutes said appeal in accordance with the rules of said Court, until the determination thereof."

Notices of appeal were filed within the 15-day period. Several applications for stay and motions to consolidate and accelerate were filed by various parties and were granted by this Court in a *per curiam* order on November 9, 1967.

Jurisdictional Statements attacking the district court's judgment with regard to the Commission's order in the *Merger* case have been filed by N&W and its allies, The Baltimore and Ohio Railroad Company ("B&O"), The Chesapeake and Ohio Railway Company ("C&O") and Western Maryland Railway Company ("WM") (No. 778); by Gruss (No. 830); by the NH Bondholders (No. 831); by E-L and D&H (No. 832); by the Reading Company ("Reading") (No. 834); and by Scranton and Shapp (No. 835).

The *Inclusion* order is attacked by N&W (No. 779); by B&M (No. 833); and by the E-L Bondholders (No. 836).

Of the three protected roads, B&M attacks the *Inclusion* order while defending the *Merger* order. E-L and D&H take the opposite position, defending the *Inclusion* order, while making a limited attack against the *Merger* order.

The United States, the Commission, the State of New York and several other parties are defending the district court's judgment as to both orders, while Penn and Central support the judgment with regard to the *Merger* order.

Summary of Argument

The district court was clearly correct in sustaining both orders. The Commission's order authorizing and permitting prompt consummation of the Penn-Central merger will make possible very substantial benefits to the carriers and the public which they serve and, unless the merger is further delayed, will result in preserving the essential passenger and freight services of the New Haven. Except for Scranton and Shapp, no one even suggests that the merger is not in the public interest. The Appendix G conditions adopted by the Commission are clearly lawful and will provide ample protection for E-L, D&H and B&M should any of those roads for any reason not be promptly included in the N&W system. The *Inclusion* order provides terms for the inclusion of the three roads in the N&W system which, based on the record, are clearly equitable to all parties involved.

N&W and its allies should no longer be permitted to delay consummation of the Penn-Central merger and prevent inclusion of E-L, D&H and B&M in the present N&W system merely to enhance their chances of securing Commission aproval of the proposed N&W-C&O-B&O affiliation which, it is now abundantly clear, has been their objective from the start.

ARGUMENT

I. Consummation of the Penn-Central Merger Should Be Permitted as Soon as Possible.

There is no real question that the Penn-Central merger will eventually become a reality and will make possible

large savings to the merged company and improved service to the shipping public. The principal immediate public benefit from the merger, however, is that it *may* result in the preservation of the essential passenger and freight services of the New Haven, which will become a part of the merged system *if* consummation of the merger is permitted before the New Haven ceases operations.

The New Haven will run out of cash necessary to keep operating by the end of December or shortly thereafter. Unless the Penn-Central merger is approved by the end of the year, there is every likelihood that the New Haven will be forced into liquidation. In staying consummation of the merger for only 15 days to permit the filing of notices of appeal, the district court stated that "we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so." (J. S. 778, B-70.)

None of the appellants advance any argument which could possibly justify a further delay in consummation of the Penn-Central merger and the resultant demise of the New Haven.

A. The Commission Has Complied With This Court's Mandate.

N&W and its allies, as well as E-L and D&H, contend that the Commission's June 9 order in the *Merger* case is in conflict with this Court's mandate in *Baltimore & Ohio R. Co.* v. *United States, supra.* The Court in its opinion last March made it clear that it was holding only that it was necessary for the Commission "to conclude the inclusion proceedings" and thus determine "the ultimate fate"

of E-L, D&H and B&M,[5] "prior to permitting consummation of the [Penn-Central] merger" (p. 378). The Court stated that if the order in the *Inclusion* proceedings "is favorable these three roads would be included in the N&W system, which has indicated its acquiescence to such a plan" (p. 383).

N&W, which has evidently withdrawn any "acquiescence" it had previously indicated to including the three roads, argues that since it appears that the B&M,[6] and possibly the D&H, may reject the inclusion terms, the Commission has not determined "the ultimate fate" of all three of the roads and thus has not complied with the Court's mandate. This argument could have merit only if one assumes that the Supreme Court was not aware of the extent of the Commission's authority under section 5(2) of the Interstate Commerce Act and was requiring the Commission to do more than it had the power to do.

If any one of the three roads decides that it prefers to remain independent, as B&M may, and to take its chances on negotiating a more favorable voluntary affiliation at some later date, there is nothing the Commission can do to force it into the N&W system. All that the Commission could do is open the door for the three roads to join the N&W system, and this it has done. It cannot force them to take advantage of the opportunity.

Since N&W—because it had consummated its merger with the Nickel Plate and the other transactions authorized by

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[5] While E-L and D&H had urged this Court to delay consummation of the Penn-Central merger, B&M then supported and still favors prompt consummation of the merger.

[6] B&M is attacking the Commission's order in the *Inclusion* case because of its dissatisfaction with the terms prescribed for its inclusion. If its attack fails, it may well decide to accept the prescribed inclusion terms rather than go it alone or may receive a better offer from the N&W, which wants to keep B&M out of the Penn-Central system, so that there is no certainty that B&M will not be included in the N&W system.

the Commission in 1964—has bound itself to include the three protected roads upon equitable terms if so directed by the Commission, and the three roads were petitioning for inclusion in the N&W system, the Court naturally assumed that the granting of the petitions would determine "the ultimate fate" of the three roads. All that the Court could reasonably have required the Commission to do was determine their ultimate fate insofar as it had the power to do so in the *Inclusion* proceedings, and this the Commission has done in compliance with the Court's mandate.

In a slightly different vein, N&W contends that if "the *Inclusion* order is reversed by this Court, no valid determination of the ultimate fate of the protected roads will have been made, and, in that event, the mandate of this Court will in no sense have been satisfied" (J. S. 778, p. 12). Here, N&W seems to concede that if the Commission's *Inclusion* order is sustained, it constitutes a valid determination of the ultimate fate of the three roads, even though one or more may not accept the prescribed inclusion terms.

N&W further argues that the Commission's order would have determined the fate of the three roads if it had foreclosed their entrance into the Penn-Central system (J. S. 778, p. 14). But B&M or B&M and D&H could still decide to remain independent. Moreover, such a ruling would obviously have been improper. Although affiliation of the three roads with N&W is preferable and clearly in the public interest, if this does not happen, the inclusion of one or more of the three roads in the Penn-Central system might, upon an appropriate record, also be found consistent with the public interest.

E-L and D&H contend that "it seems inconceivable and certainly not contemplated by this Court that the Penn-Central merger could be consummated without both a final resolution of the validity of the Appendix G conditions and a final resolution of the future of E-L and D&H." (J. S.

832, p. 8.) If by "final resolution," E-L and D&H mean actual inclusion in the N&W system, then their contention is clearly wrong. Although D&H's directors have voted unanimously to recommend that the stockholders accept the prescribed inclusion terms, D&H is still exploring other affiliation possibilities.

It seems clear that this Court never intended to give each of the three protected roads power to hold up the Penn-Central merger until such time as it is actually included in the N&W system pursuant to the Commission's order in the *Inclusion* case, or in the Penn-Central system following some future proceedings, or has irrevocably decided to remain independent. The court below correctly concluded that the "Commission has now done what the Supreme Court directed it to do." (J. S. 778, B-67.) Whether this Court intended to delay consummation of the Penn-Central merger only until the Commission had concluded the *Inclusion* proceedings or until judicial review of the Commission's order had been completed is now immaterial since the orders in both the *Merger* and the *Inclusion* cases are now before the Court. In either case, the Court's mandate has now been complied with.

B. There Is No Real Question as to the Merits of the Penn-Central Merger.

At the time the *Merger* case was before this Court a year ago, the merits of the merger were attacked only by Scranton and Shapp, who had taken very little part in the proceedings before the Commission. After the Commission's order of June 9, Scranton and Shapp moved in the district court to stay proceedings on their intervening complaints before the court or, in the alternative, to permit their dismissal without prejudice.[7] Their motions were denied,

[7] Scranton and Shapp are attacking the Commission's order in both the *Merger* and *Inclusion* cases in *Borough of Moosic* v. *United States* (No. 10054—Civil, M. D. Pa.). The Borough of Moosic was not a party to the previous proceedings before this Court. That action, we are informed, is scheduled for hearing on December 15.

but an extension of time was granted to file a supplemental complaint. Scranton and Shapp failed to file supplemental complaints or further briefs as directed by the court's orders and, upon motions by the United States, the Commission, Penn and Central, the district court dismissed their complaints with prejudice.

While the dismissal of the complaints for want of prosecution was clearly warranted, the court also passed on their merits, stating (J. S. 778, B-9 fn.):

> "'While we entertain no doubt of the sufficiency of this ground, we think it well to add that, apart from any question as to standing, we find no merit in the complaints of Shapp and the City of Scranton. Much of their objection was directed against the portion of the order permitting E-L, D&H and B&M to petition in certain eventualities for inclusion in Penn-Central, but these roads could not be included in Penn-Central except on a finding that such inclusion was in the public interest and this would be subject to judicial review. The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967. Beyond this the attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission.''

Scranton and Shapp now contend that the district court erred in dismissing their complaints with prejudice and that the issues raised by them are substantial. Their appeal is clearly without merit.

They concede that the "question of dismissal with prejudice pursuant to 41(b) F. R. Civ. P. is one for the discretion of a court, and depends on the facts of a particular situation." (J. S. 835, p. 13.) In view of the urgent necessity for prompt final review of the *Merger* order,

the district court was clearly justified in its action and probably would have abused its discretion had it done otherwise.

As to the issues raised by Scranton and Shapp, it is clear that neither will suffer any harm as a result of the Penn-Central merger. The City of Scranton is not served by Penn or Central (J. S. 835, p. 14). Their fear that the merger will have a harmful impact upon the State of Pennsylvania and its citizens is not shared by the duly elected officials of that State, who do not oppose the merger. Finally, as a stockholder of Penn, Shapp will clearly benefit from, and not be harmed by, the merger.

Since none of the other appellants challenge the merits of the Penn-Central merger, there is no real question as to its merits before this Court.

C. The District Court Was Clearly Correct in Holding That the Appendix G Conditions Adopted by the Commission Were Lawful.

In the decision last March, this Court referred to the fact that a decision by the Commission in the *Inclusion* proceedings was expected by June 1967 and stated that "if it resulted in the future of the protected railroads being finally decided," then "there would be no occasion for the conditions of Appendix G being imposed" (386 U. S. at 390). Since the three protected roads were asking to be included in the N&W and the latter had indicated its acquiescence to such a plan, the Court's reasoning was obviously justified.

Before the Commission, however, N&W had made it clear that it would challenge any order by the Commission directing it to include the three roads, except as a condition to the Commission's approval of N&W's proposed merger with C&O-B&O, and there was some indication that the B&M might not accept the "fate" which the Commission had determined for it, at least not on the terms pre-

scribed by the Commission. Faced with the necessity for early consummation of the Penn-Central merger in order to save the New Haven, the Commission promptly concluded the *Inclusion* proceedings by authorizing and directing N&W to include the three roads and reaffirmed its approval of the Penn-Central merger with authority for prompt consummation, but—contrary to this Court's suggestion—also modified and reinstituted the Appendix G traffic and indemnity conditions. The Commission was clearly correct in doing so, and the district court correctly found nothing unlawful about the Appendix G conditions adopted by the Commission.

If, as we believe it should, this Court sustains the Commission's *Inclusion* order, it is at least theoretically possible that D&H and B&M will promptly approve the terms, as E-L has already done, and become parts of the N&W system at the same time that the Penn-Central merger is consummated. In that event, the Appendix G conditions would never become effective. If, however, the merger is consummated before the stockholders of D&H and B&M vote on the inclusion terms, as appears likely, then the prescribed Appendix G conditions will provide ample protection.

The strategy of N&W and its allies, of course, has been and still is to try to prevent consummation of the Penn-Central merger and inclusion of the three roads in the N&W system in the hope that it can eventually force the Commission into approving the N&W-C&O-B&O combination. Previously N&W had urged that the Penn-Central merger be held up because no protective conditions had been adopted and the Commission had not concluded the *Inclusion* proceedings. Now that the Commission has done both, N&W naturally urges delay in consummation of the Penn-Central merger because the Commission has prescribed protective conditions which it contends are unlawful, while attacking the terms of the *Inclusion* order.

As summarized in the opinion of the district court, N&W attacked the Appendix G conditions on the grounds "that the revenue indemnity conditions create a pooling agreement in defiance of § 5(1) of the Interstate Commerce Act; that they will unwarrantably injure the unprotected roads; and that there is no substantial evidence of the merger's being in the public interest so long as the Appendix G conditions remain in effect." The court below carefully considered and correctly found "these conditions without merit" (J. S. 778, B-10).

N&W argues here that the district court affirmed the Commission's *Merger* order on a ground entirely different from that relied upon by the Commission by upholding the Commission's order on the ground that the "Appendix G conditions take sufficient care of them [the protected roads] *while they work out their future*", while N&W claims the "Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the protected railroads" (J. S. 778, p. 15). This argument is clearly without merit.

In the text of the revised Appendix G conditions (330 I.C.C. at 362), the "protective period" is defined to extend until inclusion of any one of the three protected railroads in the N&W, the Penn-Central system, "or any successor" to N&W (which would presumably even include an N&W-C&O-B&O system). The Commission clearly recognized the possibility that one or more of the three roads might not accept the inclusion terms and provided for that contingency in the revised Appendix G conditions.

No objection to the Appendix G traffic and indemnity conditions is voiced by Penn or Central or the protected roads, E-L, D&H and B&M. As finally framed by the Commission, they are ideally suited for their purpose and the district court was clearly correct in finding them to be lawful in all respects.

D. The Reading No Longer Seeks a Delay in Consummation of the Merger.

The Reading has long been considered a "family line" of the B&O, with some 38 percent of its stock being owned by the B&O and another 10 percent held by Otis & Co. being subject to a first refusal by C&O. Several of Reading's officers are former B&O employees or hold office jointly in both roads. Reading intervened in the Penn-Central proceedings in August 1962, but did not oppose the merger and sought no special protective conditions (J. S. 778, B-19). It was not until after the Commission's report and order in the *Merger* case in April of 1966 that Reading first sought to introduce evidence as to the alleged adverse effect of the Penn-Central merger upon it. Its previous inaction, Reading claims, was due to its belief that as a member of the C&O-B&O "family", it would soon be merged directly into that system. The Commission, while granting Reading leave to participate in the further hearing, as to the effect of the Appendix G conditions, denied its request to reopen the record to show general adverse effect of the merger, holding that the Reading was bound by its original concession that the effect of the merger transaction would be inconsequential. The district court correctly found that it could not "fault the Commission for this ruling." (J. S. 778, B-21.)

While no longer asking to have the merger postponed (J. S. 834, p. 4), Reading still seeks protective conditions similar to those in Appendix G, "pending Reading's inclusion in a major railroad system." With C&O-B&O controlling, or at least having the power to control, the Reading, it is already included in a major railroad system. But even assuming that C&O's control or power to control does not amount to "inclusion", Reading's appeal is still without merit. As the district court pointed out: "Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new

positions at any time and seek to support them with evidence that had been available all along" (J. S. 778, B-21).

In any event, even if this Court should find that Reading is entitled to a post-merger hearing to present evidence as to its need for Appendix G-type of protective conditions, prompt consummation of the merger should be permitted.

E. The District Court Correctly Held That It Was Not Necessary for the Commission to Reserve Jurisdiction to Impose a Capital Loss Indemnity.

In addition to re-examining the Appendix G conditions, the Commission during further hearings in the *Merger* case also considered whether to require Penn-Central to pay a capital loss indemnification for any decrease in the price payable by N&W to the three protected roads due to diversion of their traffic to Penn-Central.

Before the Commission, N&W and the three roads all urged the Commission *not* to impose any capital loss indemnity. The three protected roads contended that "the price paid for their lines should not be affected by the new Penn-Central competition," while N&W urged approval of the N&W-C&O "Dereco" proposal. (330 I.C.C. at 359.) The Commission did not impose any capital loss indemnity, referring to the fact that in the *Inclusion* case it found that the three roads "will experience no capital loss as a result of the Penn-Central merger." (330 I.C.C. at 360.)

The Commission did not reserve jurisdiction to impose such a condition and did not discuss the possibility of doing so in its report. Reservation of jurisdiction for this purpose was not requested by anyone, at least not specifically, until E-L filed a petition for reconsideration of the Commission's June 9 report and order in the *Merger* case, which petition was denied by the Commission by order dated September 8, 1967. The district court held that while it would not have disapproved a reservation of jurisdiction for this purpose, it would not direct the Commission to

amend its order to do so. (J. S. 788, B-17.) The district court was clearly correct.

E-L and D&H still contend (J. S. 832, pp. 8-11) that the Commission should have reserved jurisdiction to require a capital loss indemnification, but purely as a precaution against the possibility that this Court might not affirm the order in the *Inclusion* case. The Commission should not be directed to reserve jurisdiction for this purpose unless this Court decides that: (1) the price N&W is required to pay is too high; (2) the price is too high because of future diversion of traffic by Penn-Central from the three roads; (3) Penn-Central should be required to pay for any resultant diminution in the value of the three roads to N&W; and (4) the Commission has authority to impose such an indemnity, which it has never before done or even considered. Should the Court decide all four of these questions in the affirmative, and we believe it should not, then the Commission can be directed to amend its order in this respect, but the *Merger* order should otherwise be upheld and immediate consummation of the merger should be permitted.

F. The District Court Was Correct in Upholding the Commission's Decision Not to Require Inclusion of the New Haven as a Condition Precedent to Consummation of the Merger.

Gruss and the NH Bondholders are interested in getting the best possible price for their interests in the New Haven estate, whether from a sale of the assets to a merged Penn-Central system or through liquidation of the railroad. It is only in the light of this objective that their strange arguments make any sense.

If inclusion of the New Haven were made a condition precedent to consummation of the merger, as Gruss and the NH Bondholders urge, it would almost certainly result in the liquidation of the railroad, causing tremendous harm

to the public dependent upon its service and probably to the New Haven creditors as well.

As matters now stand, the New Haven can be included in the Penn-Central system only through transfer of its assets pursuant to the purchase agreement negotiated by Penn-Central, and the New Haven's Trustees. The purchase price under the agreement, approved by the Commission on November 16, will be the subject of litigation which is expected to take two or three years. The New Haven, however, will probably run out of cash necessary to keep operating within the next two months. Unless the New Haven receives sufficient additional cash in a hurry, it will have to cease operations.

Penn and Central are willing, upon consummation of their merger, to loan the New Haven cash up to an amount of $25 million over the next three years. By its order dated November 16 and served November 21, the Commission has required Penn and Central, upon consummation, to loan sufficient cash to the New Haven to keep it operating, pending the acquisition of its assets. Under the Commission's order, the merged system will also have to absorb a substantial part of the New Haven's losses during the interim period. But Penn and Central cannot be required to advance any cash to the New Haven until their merger has been effectuated. Unless the merger is consummated promptly, the New Haven's demise appears to be a certainty.

Thus, the arguments of Gruss and the NH Bondholders must be rejected, because if consummation of the merger is held up until the New Haven is included, the New Haven could never be included.

II. The District Court Was Correct in Sustaining the Commission's Order in the Inclusion Proceedings.

In the original report in the N&W-Nickel Plate proceedings (324 I.C.C. 1), the Commission, as a condition to its approval of the transactions proposed by N&W, retained jurisdiction in Appendix O to permit the filing of petitions for inclusion in the N&W system by E-L, D&H and B&M and, if the proposed affiliation "be found consistent with the public interest," to direct "the accomplishment thereof under such terms as may be found equitable to all parties involved." (324 I.C.C. at 148.)

As pointed out by the district court, no substantial attack was made below on the Commission's basic finding "that inclusion of E-L, D&H and B&M in the N&W system on proper terms is in the public interest." (J. S. 779, B-30.) N&W argued below (1) that the Commission should have considered the desirability of including the three roads in the proposed N&W-C&O-B&O system and (2) that it should have found that inclusion of any of the three roads in the Penn-Central system would not be in the public interest. The district court properly rejected these arguments because the first course would have frustrated the expeditious decision required herein and the second would have required a negative determination not within the issues in the *Inclusion* case.

As to the fairness of the terms prescribed by the Commission and approved by the court below, this matter will be covered by other appellees and will be dealt with herein only very briefly. The terms prescribed by the Commission are clearly equitable to all parties involved.

As they did below, N&W attacks the *Inclusion* order on several grounds, B&M claims the price fixed for it is too low, and the E-L Bondholders contend that the order will permit dilution of the security for their mortgages and impair or prevent payment of interest, particularly on income bonds.

A. Inclusion of the Three Roads in the N&W System Is Clearly in the Public Interest.

N&W's principal argument is based upon a misconstruction of § 5(2)(d)[8] of the Interstate Commerce Act (49 U.S.C. § 5(2)(d)). That section provides that the Commission may, upon petition by railroads requesting inclusion and upon a finding that such inclusion is consistent with the public interest, require as a prerequisite to its approval of a proposed transaction, the inclusion upon equitable terms of such other railroads in the territory involved. Before the Commission can require inclusion it must first find that such inclusion would be consistent with the public interest and then find equitable terms, as it has done here. As the Commission stated in its report, "before defining the terms of inclusion based on earnings, we have set out in detail below the considerations that compel the conclusion on this record that petitioners' immediate inclusion in the N&W system is clearly in the public interest." (330 I.C.C. at 789.) The Commission went on to "find that inclusion of petitioners is in the public interest, and that on this record equitable terms may be based on the parties' comparative earnings." (330 I.C.C. at 790.)

N&W argues that the inclusion terms are inequitable and therefore the Commission's finding as to consistency with the public interest must fall. Clearly this is not so. Without equitable terms the Commission cannot of course require inclusion, but its finding as to public interest is not dependent upon the fairness of the terms. As discussed by other appellees, the inclusion terms are equitable

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[8] "(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

to all parties involved, but even if this Court should find otherwise, the Commission's basic finding as to consistency with the public interest should not be disturbed and any remand should be only as to the inclusion terms.

B. The Commission Clearly Considered the Possibility That All Three Roads Might Not Be Included in the N&W System.

N&W's second contention is that there are no findings to support inclusion of E-L alone, or E-L and D&H without B&M. N&W argues: "Every finding in the Commission's report with respect to the public interest in inclusion and the financial terms, assumes the inclusion of all three railroads as a package." (J. S. 779, p. 15.)

Since all three roads had petitioned for inclusion and the inclusion of all three in the N&W system would clearly be in the public interest, the Commission naturally fixed an inclusion price for each of the three roads. At the same time, however, the Commission clearly recognized and provided for the possibility that one, two or even all three of the roads might not become a part of the N&W system. In Appendix F (330 I.C.C. 868), the Commission provided that if E-L rejected the inclusion terms, N&W would not be required to include D&H and B&M and if D&H were not included, N&W would not have to take in the B&M. It also provided that if the stockholders of any petitioner rejected the inclusion terms, that road's petition for inclusion in the Penn-Central system would be considered dismissed. Thus, while the Commission's report and order provided inclusion terms for each of the three roads, provision was also made for the contingency that one or more of the roads might not be included.

N&W's argument boils down to the idea that the Commission should have prescribed three sets of inclusion terms for E-L—one if only E-L is included, a second if E-L and D&H are included, and a third if all three roads are in-

cluded—and two sets of terms for D&H—one if B&M is also included and another if B&M is not. As the district court pointed out, "it would have been wholly impracticable for the Commission to ask E-L and D&H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads." The lower court was clearly correct in finding that the "Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuations for E-L and D&H must be taken to have encompassed the possibility that all three roads might not enter their new home" (J.S. 779, B-61).

C. The Inclusion Price Prescribed for B&M Was Clearly Justified by the Record.

B&M's claim that it has been undervalued is based primarily on the argument that the Commission should not have adopted the testimony of its witness that the only savings which would result from its control by N&W would be those from consolidation of traffic solicitation forces. Although the district court confessed surprise that control savings would be as limited as B&M's witness estimated, the court pointed out that a party cannot normally object if an agency has awarded all that its witness has claimed (J.S. 779, B-54).

While the Commission evidently believed that control savings would exceed those claimed by B&M's witness, the district court correctly ruled it "was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B&M had not furnished this" (J.S. 779, B-55). The district court was also correct in holding that the Commission was not required to reopen the record because such evidence was furnished by an N&W witness in the N&W-C&O-B&O merger proceedings, since B&M had already had a fair opportunity to present its case, which is all that is required.

B&M now argues that it "had no duty to introduce evidence of the control savings which might be realized under every conceivable degree or variation of control the Commission might find N&W would exercise" (J.S. 833, pp. 16-19). Although it had no duty to do so, it cannot complain if the Commission based its findings as to inclusion terms on the only evidence as to control savings which it did introduce. As the district court put it, "if a carrier chooses to present its case on a basis more conservative than the facts would warrant, the Commission can take it at its word" (J.S. 779, B-54).

D. There Is No Evidence in the Record Which Would Have Justified Special Treatment for E-L Bondholders.

The E-L Bondholders' claim that the Commission should have imposed some sort of safeguard for their benefit is clearly without merit. They did not take part in the hearings before the Commission and did not even intervene until the last day for filing exceptions to Commissioner Webb's recommended report. As the district court pointed out, should N&W abuse its position and try to divert traffic and other benefits from New E-L to its own lines, the E-L Bondholders could bring appropriate court action.

The E-L Bondholders now "ask only that the Commission's reservation dealing with post-consummation relief be clarified for their protection." (J. S. 836, p. 13.) None of the arguments advanced by them, however, would justify a remand for this purpose.

The statute clearly permits acquisition of control through purchase of stock without assumption of existing bonded indebtedness. If the E-L Bondholders wanted special treatment, they should have developed a record and proposed specific suggestions. Having failed to do this, they cannot properly request a remand, and the district court was clearly correct in so holding.

III. Even if the Commission's Order in the Inclusion Case Should, for Some Reason, Be Remanded, the Order in the Merger Case Should Be Upheld and Prompt Consummation Permitted.

On the basis of the record before it, the Commission was clearly correct in finding that inclusion of E-L, D&H and B&M in the N&W system would be consistent with the public interest, and the terms prescribed by it are equitable to all parties involved. If, however, this Court should hold otherwise and remand the *Inclusion* order to the Commission, either because the price fixed for E-L or D&H is too high or that for B&M is too low, then the Commission's order in the *Merger* case should still be affirmed. The Appendix G conditions, to which neither the three protected roads nor Penn and Central raise any objection, would adequately protect E-L, D&H and B&M during the period of any further proceedings before the Commission.

As discussed above, no substantial question has been raised as to the merits of the Penn-Central merger and the need for its prompt consummation. Scranton and Shapp, the only ones challenging the merits, declined to prosecute their actions below and there is no evidence that either would be harmed by the merger. The appeal of E-L and D&H is purely precautionary, aimed at having the merger held up until E-L is actually included in the N&W system and D&H has secured an absolute right to be included, while exploring other affiliation possibilities. Gruss and the NH Bondholders seek merely to enhance their bargaining position *vis-a-vis* Penn-Central and to realize the best price possible for their interests, even if it means the cessation of the New Haven's essential operations; indeed, that may be their objective. N&W and its allies have no valid objections to the merger and seek a delay in its consummation only to improve their chances for Commission approval of the proposed N&W-C&O-B&O affiliation.

Thus, even if this Court should disagree with the district court and remand the *Inclusion* order to the Commission, the order in the *Merger* case should still be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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